

No.

82-1410

IN THE

Supreme Court of the United States

October Term, 1982

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ALEXANDER L. STEVAS,
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MILLIKEN RESEARCH CORPORATION and
CHAVANOZ, S.A.,

Petitioners,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SIMON H. RIFKIND

JAY TOPKIS

(Counsel of Record)

STEVEN B. ROSENFELD

GERARD E. HARPER

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

345 Park Avenue

New York, New York 10154

(212) 644-8000

Attorneys for Petitioners

*Milliken Research Corporation and
Chavanoz, S.A.*

Of Counsel:

HOWARD E. MANNING, SR.

MANNING, FULTON & SKINNER

801 Wachovia Bank Building

Raleigh, North Carolina 27602

QUESTIONS PRESENTED

1. This case presents again the question on which this Court granted certiorari in *Weyerhaeuser Co. v. Lyman Lamb Co.*, U.S. 81-1618: in an antitrust price-fixing case in which only one element of a two-part price is fixed, may the plaintiff prove its damages by proving merely the full amount of the fixed element—or must plaintiff prove the difference between the total price actually paid and the total price that would have been paid but for the conspiracy?*

2. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), rejected *in pari delicto* as a defense to antitrust liability. In a trial to determine the amount of damages that plaintiff sustained by reason of an antitrust violation, does *Perma Life* also bar defendant from introducing evidence that plaintiff's own actions, not the antitrust violation, proximately caused some or all of plaintiff's damages?

3. Does *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which held only that there is no implied right of action for contribution between joint antitrust wrongdoers, also strip a court of the power to exclude from an antitrust plaintiff's recovery the damages attributable to the plaintiff's dealings with a joint tortfeasor

* The petition in *Weyerhaeuser* put the question this way: "Can the measure of damages in cases involving the alleged fixing of only one element of price be based solely on that single element, or must it reflect the challenged conduct's effect on the total price paid by the buyer?"

We are advised that defendants and counsel for class plaintiffs have reached a settlement in *Weyerhaeuser*, and that a motion to vacate the writ of certiorari as moot awaits settlement-approval proceedings in the district court.

who has settled—or does a court have power to regulate abuses of the judge-made rule of joint-and-several liability by eliminating such damages from a plaintiff's claim?

4. In an antitrust case in which issues of liability and damages were tried separately, was it a denial of due process to allow an antitrust plaintiff to recover damages allegedly incurred by a subsidiary, when no notice was given of the subsidiary's claim until years after judgment had been entered on the issue of liability?

PARTIES TO THE PROCEEDING

In addition to petitioners, the appellants/cross-appellees below were ASA, S.A. (a French corporation formerly known as Ateliers Roannais de Constructions Textiles, S.A.), ARCT, Inc., a partly-owned subsidiary of ASA, and Milliken & Company (formerly Deering Milliken, Inc.). Milliken & Company has filed a separate petition for certiorari.

The only other parties to this proceeding are respondent Burlington Industries, Inc. and its onetime subsidiary (now division), Madison Throwing Company, Inc.*

* Petitioner Milliken Research Corporation has no subsidiaries and is itself a wholly-owned subsidiary of Milliken & Company. Petitioner Chavanoz, S.A. is a French corporation which, to counsel's knowledge, has no publicly-held subsidiaries or affiliates.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners Milliken Research Corporation and Chavanoz, S.A. ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit, entered on September 23, 1982.

OPINIONS BELOW

This petition arises from a multimillion-dollar judgment on damages in a bifurcated antitrust case in which liability was previously adjudged.

The opinion of the Court of Appeals on damages is reported at 690 F.2d 380 and appears as App. A in the Joint Appendix. The original opinion of the District Court on damages, unofficially reported at 1981-82 CCH Trade Cas. ¶ 64,214 (D.S.C. 1981), appears as App. B. The District Court's unreported opinion amending its original damages decision appears as App. C. An unreported decision and order of the District Court on certain damages issues appears as App. D.

The opinions on liability are not contained in the Joint Appendix but are officially reported as *Duplan Corp. v. Deering Milliken, Inc.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd in part and rev'd in part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

JURISDICTION

The judgment of the Court of Appeals (App. G) was entered on September 23, 1982. A timely petition for rehearing and rehearing *en banc* was denied on November 26, 1982 (App. H). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, 15 U.S.C. § 15b, provides provides in pertinent part:

"Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Parties: Petitioners and allied companies ("defendants") sold and licensed patented machinery to textile manufacturers. The machines enabled textile manufacturers (or "throwsters") to treat synthetic yarns through a process called "false twist." The false twist process rendered synthetic yarns such as nylon and polyester suitable for a wide range of uses, from hosiery and double knits to woven fabrics for dresses and suits.

Defendants opted to receive a portion of their compensation for the patented machines in the form of patent royalties. The throwsters paid an initial purchase price for each machine, and thereafter, under the terms of a license to use the patented features embodied in the machine, the

throwsters periodically paid a production royalty on the amount of yarn produced.*

Respondent Burlington Industries, Inc. ("plaintiff"), the largest textile company in the world, was a competitor of defendant Milliken & Company in the production of many textile products. Plaintiff purchased defendants' patented machines and paid production royalties.

Plaintiff also bought false twist machines from Leeson Corporation, by far the world's largest manufacturer and seller of false twist machines. Like defendants, Leeson owned patents covering its machines, and charged its throwster-customers a production royalty.

The Liability Trial: In 1969, plaintiff brought suit against defendants alleging, among other things, that defendants had conspired with Leeson to stabilize the price of false twist machines. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337 and 1338. Plaintiff's action was consolidated with actions by nineteen other throwsters (all since settled), and trial was bifurcated to allow separate consideration of liability and damages. App. J, JA111. Leeson was not made a party in any of these consolidated actions.

On liability, the trial court held that defendants had joined in a conspiracy with Leeson in 1964, when defendants and Leeson settled some litigation involving three Leeson patents—Leeson had claimed that defendants' machines infringed the Leeson patents, and the settlement,

* One defendant, Chavanoz, was the owner of the patents. Chavanoz licensed a French company, defendant ASA, or "ARCT-France," to make and sell the machines, while defendant Milliken Research Corporation ("DMRC") was licensed to use the machines, with a right to sublicense. DMRC issued sublicenses to throwsters and collected the royalties, which it divided with Chavanoz.

in broad outline, provided that each side would not sue the other's customers for patent infringement. The court found that the purpose and effect of this settlement was to stabilize and maintain, at existing levels, the patent royalty rates which defendants and Leeson charged their respective customers. 444 F. Supp. at 683-85.

In its opinion adjudging liability, the trial court ruled also that the conspiracy had had an "impact" on throwsters sufficient to predicate liability for trebled damages under Section 4 of the Clayton Act (15 U.S.C. § 15). The court based this finding solely on the undisputed evidence that each of the plaintiff-throwsters had paid royalties to defendants. 444 F. Supp. at 687 & n.20. The court had no occasion to consider the *amount* of damages, if any, that plaintiff sustained by reason of the conspiracy; that question was reserved for later trial.

The trial court's ruling on liability was affirmed by the Fourth Circuit in all relevant parts, 594 F.2d 979 (1979), and this Court denied certiorari, 444 U.S. 1015 (1980).

The Damages Trial: Plaintiff perceived the ensuing damages trial as an exercise in arithmetic: in its damages case, plaintiff introduced *only* the full amount of the royalties it had paid to defendants (\$2.7 million) and Leeson (\$4.9 million), and then asked the trial court to rule, as a matter of law, that damages equaled full royalties. Defendants moved to dismiss on the ground that plaintiff had failed to prove the amount of the illegal overcharge—the difference between the royalties actually paid and the royalties or other payments that would have been paid if there had been no conspiracy—and thus had not proven any damages.

The trial court denied defendants' motion to dismiss, ruling that full royalties were the measure of damages, subject to diminution only by the modest value of technical support services which defendants and Leeson each supplied to throwsters. The court then refused defendants' formal offer of proof that, had there been no royalty-fixing conspiracy, plaintiff would have paid *some* royalties and would also have paid *increased prices* for the patented machines. App. B, JA39-40.*

In consequence, the only issue actually tried was the value of the technical support services. The trial court found these to be worth 10% of the royalties paid to defendants and 5% of Leeson royalties. Subtracting these sums, the court entered judgment in favor of plaintiff for three times the remainder—a total of \$20.9 million. App. B, JA67.**

The Fourth Circuit's Decision: The Fourth Circuit vacated the damages judgment and remanded for a new damages trial.

But the ruling came in an opinion at war with itself. The Fourth Circuit held that "the district court erred in using the actual royalties paid as the measure of damages without considering whether royalties or some other compensation would have been payable absent the illegal conspiracy." 690 F.2d at 386; App. A, JA11.

* Plaintiff had previously sought and obtained a ruling that defendants were not entitled to take discovery on the issues whether plaintiff would have paid some royalties and increased machine prices. App. D, JA76-77.

** Relying on the doctrine of claim reduction, the district court subsequently reduced the judgment to \$7.4 million by excluding from the award the damages attributable to plaintiff's royalty payments to Leeson. The Fourth Circuit overturned this reduction. See Point III *infra*.

Strangely, however, the Court of Appeals went on to say: "... we further hold that the royalties actually paid may serve as a prima facie estimate or 'yardstick' of damages, which defendants must overcome with persuasive evidence." *Id.*

Thus the Fourth Circuit has ordered a retrial of damages, but has ruled that plaintiff may do on the retrial exactly what it did on the first damages trial: prove its full royalty payments, and rest. And then, the court below has held, it is defendants who must come forward and prove the real extent of plaintiff's damages.

REASONS FOR GRANTING THE WRIT

I

The Fourth Circuit's decision conflicts with the law in other circuits that an antitrust plaintiff must prove damages by reference to the total price.

In price-fixing cases, it is a fundamental that damages—the illegal overcharge—are determined by the "difference between the price paid and the market or fair price that [plaintiff] would have had to pay under natural conditions had the combination been out of the way." *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906). And it is equally settled that the antitrust plaintiff, *not* the defendant, has the burden to establish, with evidence, not simply the fixed price he actually paid, but a just and reasonable estimate of the amount of the *difference* between the fixed and the fair market price. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg.*, 225 U.S. 604, 616 (1911).

The lower courts are divided and confused on the proper application of these basic rules to cases in which only one element of a two-part price is fixed—a conflict this Court had decided to hear in *Weyerhaeuser Co. v. Lyman Lamb Co.*, U.S. 81-1618. The Fifth Circuit (in *Weyerhaeuser*) and now the Fourth have stated the view that, in two-part pricing cases, an antitrust plaintiff may satisfy its burden of proof merely by showing the full amount of the fixed portion of the price actually paid. Decisions in the Second, Ninth, Tenth and Eleventh Circuits, on the other hand, have adopted the view that, in such cases as in all other antitrust price-fixing cases, a plaintiff's evidence on damages must establish the effect of the challenged conduct on the total price the plaintiff paid for the product.

One of these views is wrong. Without a definitive ruling from this Court, which has never directly addressed the issue, that error is certain to haunt and prolong every price-fixing case (and they are common) in which the seller is compensated in two or more ways for the same basic good or service.

The basic good bought by plaintiff here was patented textile equipment. There is no basis in law or logic to separate the intangible patent rights from the tangible equipment which embodied them; both lower courts, indeed, explicitly recognized that the patent royalties “constituted in effect a part of the purchase price for [false twist] machines.” 690 F.2d at 385, App. A, JA9; 444 F. Supp. at 673.* To prove damages, therefore, plaintiff was re-

* In the parallel litigation involving the throwsters' claims against Leesona (discussed *infra* pp. 14, 19), the Fifth Circuit adopted the same view. *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (“the sales price of the [Leesona false twist] machinery consists of two elements: the initial price of the machine and the royalty payments”).

quired to show the difference between the total price actually paid for the machines and patents together, and the total fair market price that would have been paid for the machines and patents in an unstabilized market. But plaintiff made no such showing—it offered not a single piece of damages evidence beyond the amount of the royalties actually paid, and, in a calculated trial tactic, sought and obtained rulings that no more proof was required.

The Fourth Circuit's approval of that approach—its ruling that proof of full royalties establishes a *prima facie* case, and its decision to remand rather than to order dismissal forthwith of plaintiff's claim—is in conflict with the one case which the Fourth Circuit acknowledged was “directly on point,” *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

In *Alden-Rochelle*, the court found a conspiracy to fix the royalties paid by theater owners for the right to perform copyrighted music which was incorporated in motion pictures. The price paid by theater owners for the right to perform a motion picture was composed of two parts: film rental, paid to the producer of the film, and copyright royalties, paid to the proprietors of the musical copyrights. To prove damages, plaintiff theater owners, like plaintiff here, offered as evidence only the full amount of the copyright royalties paid. The plaintiff theater owners did not prove the royalties which would have been paid but for the conspiracy, nor did they prove the effect on motion picture rentals which would have resulted from the elimination of fixed royalties. Holding that plaintiffs' proof of fixed royalties did not prove the extent of plaintiffs' damages, the court dismissed the damages claim for failure to establish a *prima facie* case (80 F. Supp. at 898):

“None of the cases hold that those who have paid a monopolist a price for its product, may claim that the extent of their damage is the full amount paid. The amount of any overcharge may be recovered, but the purchaser should offer some evidence from which the trial court may reasonably approximate the overcharge. . . . The burden of proof is on plaintiff to show that part of his case by a fair preponderance of the evidence. When it comes to proving the extent of his damage the burden a plaintiff carries in an anti-trust action is lighter; all he need prove are the basic facts from which the court may reasonably approximate the amount of the damages. A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator.” (Emphasis added.)

To the same effect, and equally in conflict with the Fourth Circuit’s ruling here and the Fifth Circuit’s decision in *Weyerhaeuser*, are decisions in at least three other circuits holding that, in multi-element pricing cases, a plaintiff must prove more than simply the full amount of the tainted price.

For example, in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), a tie-in class action, plaintiffs showed only the amount by which the contract price on the tied items exceeded the market price for comparable items; the Court of Appeals, reversing a directed verdict for plaintiff class on the issue of fact of damage, held that the damages evidence must establish the difference between the total contract price for both the tied and tying items and the total price that would have been paid for both items but for the tie-in. *Id.* at 52-53; *accord*, *Kypta v. McDonald’s Corporation*, 671 F.2d 1282, 1286 (11th Cir.), *cert denied*, 103 S.Ct. 127 (1982) (“even assum-

ing *arguendo* an overcharge in the amount of rent due under the tied product," defendant "might otherwise have upped the price exacted for its franchise").

Similarly, in *Albertson's Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459, 463 (10th Cir. 1974), in which plaintiff retailers alleged that defendant sugar wholesalers had fixed the freight charges on sugar, both trial and appellate courts rejected plaintiffs' assumption that damages were "an amount equal to the phantom freight they now pay"; rather, as the trial court there said, "it is clear" that, but for the conspiracy, defendant wholesalers "would have to raise their base price" for sugar. *Id.* at 53; *accord*, *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 580 (9th Cir. 1980) ("common sense" that drop in allegedly fixed freight charge would compel change in price of plywood).*

The Fourth Circuit's departure from these overcharge cases etches in sharp relief the conflict which this Court was set to resolve in the *Weyerhaeuser* case. In *Weyerhaeuser*, the Fifth Circuit upheld a jury instruction that limited the damages issues to consideration of only the fixed element (the freight charge) of the total price of the product (plywood). *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co. v. Lyman Lamb Co.*, 102 S. Ct. 2232

* *Accord*, *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 93-94 (S.D. N.Y.), *aff'd*, 520 F.2d 1231 (2d Cir. 1974), *cert. denied*, 423 U.S. 1053 (1976) (plaintiff's proof of damages from conspiracy to eliminate one element of commission payments must include consideration of other elements); *cf. Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-49 (1980) (holding that a conspiracy to fix one element of a price [credit payments] is a *per se* violation, this Court notes that elimination of the fix might affect the up-front or "invoice" price of the good).

(1982). Like the Fourth Circuit here, the Fifth Circuit there held that damages from a price-fixing conspiracy equal treble the full amount of the fixed element of the total price—in effect, a rule of automatic damages which relieves the plaintiff of the burden to prove the extent of its injury.

Such a rule of automatic damages is utterly foreign to the principle enunciated by this Court in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946), the case on which both the Fourth and Fifth Circuits relied. In *Bigelow* and like cases, this Court has held that a plaintiff may not be denied antitrust recovery solely because the damages evidence is based on approximation: establishing the price that would have been paid but for a conspiracy necessarily involves a hypothetical reconstruction of an untainted market, and so damages will always involve some degree of imprecision. 327 U.S. at 264-65. But that holding was intended to guide a court's evaluation of a plaintiff's evidence of what would have happened, *not* to allow the plaintiff simply to assume that the damages equal the fixed price. Indeed, *Bigelow* warned that, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation and guesswork." *Id.* at 264.

More recently, in reaffirming this essential qualification of the *Bigelow* principle, this Court rejected the view that a plaintiff is entitled to "automatic" damages as a matter of law or assumption, awarded without evidence of the economic and market realities existing during the damages period. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (damages for price discrimination in violation of Robinson-Patman Act).

The legal standard adopted by the Fourth and Fifth Circuits ignores market realities, substitutes assumption for evidence, and endorses a concept of automatic damages. By presuming an antitrust plaintiff's entitlement to a trebled refund of the tainted price, the standard imposes liability not for stabilizing a price, but for charging the price in the first place. The result is potentially staggering damages judgments (here, in the tens of millions of dollars) that bear no relationship to the actual injury caused by the antitrust violation.

The confusion and conflict in the lower courts on this issue present the paradigm for granting certiorari under this Court's Rule 17. As it was set to do in *Weyerhaeuser*, this Court should now put an end to the disarray.

II

The Fourth Circuit's decision conflicts with the law in other circuits that evidence of causation is relevant to the amount of antitrust damages.

This case is particularly appropriate for certiorari, because the Fourth Circuit's decision reflects profound confusion not only about the type of evidence an antitrust *plaintiff* must offer to satisfy its burden of proof, but also about the type of evidence an antitrust *defendant* may offer to rebut plaintiff's showing. In a separate portion of its opinion, the divided court below held that defendants could not introduce evidence that more than half plaintiff's alleged damages—its \$14 million claim to recover treble the royalties paid to Leeson—was the direct and proximate result, not of defendants' actions, but of plaintiff's own.

This ruling, which again places the Fourth Circuit in conflict with other courts, raises the second question on which we seek review: may an antitrust defendant introduce evidence that the plaintiff's *own* actions, and *not* defendants' antitrust violation, were the proximate cause of the plaintiff's claimed damages?

Here, defendants' proffered evidence would have shown that, shortly before defendants settled their patent litigation with Leesona (thereby joining the adjudged conspiracy), plaintiff *itself* had settled litigation with Leesona over the *same* Leesona patents; as part of the settlement, we offered to prove, plaintiff had agreed to acknowledge the validity of the Leesona patents, and to pay the Leesona royalty rate, in exchange for a secret competitive edge over all other Leesona customers in the form of a hidden one-third kickback on its royalty payments to Leesona. This secret deal had the direct effect of stabilizing Leesona royalties: in a later antitrust suit brought by plaintiff and other throwsters against Leesona, the Fifth Circuit held that the kickback scheme fixed the royalties on (and thus the price of) Leesona machines; our proof would have shown that plaintiff engineered the deal to achieve exactly that result, thereby causing the Leesona-related damages of which it now complained.*

Completely ignoring causation analysis, the majority opinion below characterized our proffered evidence as rele-

* The Fifth Circuit's ruling came in an antitrust suit (parallel to this one) brought against Leesona by various throwsters including plaintiff. *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136 (5th Cir. 1976), *cert denied*, 433 U.S. 910 (1977). Plaintiff's participation in the scheme was never aired in that suit because, once Leesona's violation had been established but before consideration of damages, Leesona and plaintiff settled. See Point III *infra*. The trial court here deducted Leesona's kickbacks to plaintiff from the royalties awarded as trebled damages.

vant *only* to an *in pari delicto* defense to liability, and therefore “not timely” at the damages trial. 690 F.2d at 387; App. A, JA13.

In a strongly-worded dissent, Circuit Judge Kenneth Hall rejected the majority’s “pat dismissal” of the evidence and expressed his “astonish[ment]” that the court “would countenance [plaintiff’s] opportunistic approach to this case much less sanction a reward for such reprehensible conduct.” *Id.* at 395, 397; App. A, JA32, 36. Recognizing that the issue on damages was whether some or all of plaintiff’s ostensible wounds were self-inflicted, Judge Hall reasoned that plaintiff “should not now be heard to complain that it was actually harmed by its own scheme” to stabilize Leeson royalties. *Id.* at 397; App. A, JA36.

The majority’s ruling that our proffer related only to the “liability” defense of *in pari delicto* does violence to the teachings of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968). There, this Court explicitly held that the *in pari delicto* doctrine can never be a defense to *liability*, but the Court went on to rule that “the possible beneficial byproducts of a restriction from a plaintiff’s point of view can of course be taken into consideration in computing damages.” And the concurring opinions in *Perma Life* agreed that evidence which might previously have related to an *in pari delicto* defense was now relevant, if at all, to the question of *damages*. See *id.* at 146 (White, J.) (evidence of plaintiff’s actions relevant to “the issue of causation in particularized form”); *id.* at 151-52 (Marshall, J.) (evidence of plaintiff’s actions relevant to prevent “unjust enrichment”).

In excluding such causation evidence here, the majority's ruling conflicts with the holdings of other courts that evidence of plaintiff's conduct "which heretofore was labeled as '*in pari delicto*' now is appropriate when it provides rebuttal to that plaintiff's allegations of causation of injury by defendant and resulting damages therefrom." *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1131 (S.D. Tex. 1976); see *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). And the Fourth Circuit is not alone in misconstruing the import of *Perma Life* to anti-trust damages law, for other courts have struggled to accommodate the lessons of that case to basic causation concepts. Compare *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977) (such evidence not relevant) with *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 982 (2d Cir. 1975) (such evidence may be relevant to show "equal fault"). See generally Handler & Sacks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 70 Geo. L.J. 1123, 1150-51 (1982) (noting conflict in the circuits over proper application of *Perma Life*).

In addition, the majority ruling compounds the confusion in the lower courts over the proper scope of damages trials in cases where the issue of liability (including fact of damage) is bifurcated from the issue of amount of damages—a widespread, virtually universal, practice in anti-trust cases involving several or class plaintiffs.* The

* A bifurcation order, for example, was central to the dispute in the *Weyerhaeuser* case, see *In re Plywood Antitrust Litigation*, *supra*, 655 F.2d at 636 (barring causation evidence at the damages trial after jury finding on fact-of-damage), and has occasioned various conflict-

(footnote continued on next page)

procedural convenience of bifurcation does not alter the statutory command that a plaintiff may recover only the damages sustained "by reason of" the antitrust violation. 15 U.S.C. § 15. The whole purpose of an antitrust damages trial following a fact-of-damage finding in the liability trial is to identify the *extent* of a plaintiff's antitrust injury: the "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by [plaintiff's] proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (emphasis in original). Evidence that a plaintiff's claimed damages were directly caused by plaintiff's own actions—"by reason of" events *other than* the antitrust violation—is central to that inquiry.

Other circuits so hold. In *Knutson v. Daily Review, Inc.*, 664 F.2d 1120, 1121 (9th Cir. 1981), for example, the Ninth Circuit, which had previously ruled that plaintiffs had proven the fact of damage (548 F.2d 795, 813), upheld a judgment on remand which awarded *no* damages based on evidence that factors other than the antitrust violation had caused the claimed injury. And in *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 803 (1st Cir.), *cert denied*, 379 U.S. 931 (1964), the First Circuit, while vacating a damages award as inadequate, made clear that, at the

ing views of the type of evidence admissible at a damage trial, compare *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 21 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) (causation evidence not admissible at damages trial) with *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832, 835 (N.D. Cal. 1973) (causation evidence admissible).

damages trial on remand, the trier of fact was *not* bound by the interlocutory fact-of-damage finding to award *any* damages, if the evidence showed that the claimed damages were not caused by the antitrust violation.

This Court's guidance is needed to resolve the conflict over the import of *Perma Life* for antitrust damages cases, and, more generally, the conflict over the type of evidence which is admissible in a trial to determine the effects of an antitrust conspiracy. The Fourth Circuit's ruling renders Section 4 of the Clayton Act, not a remedial provision to repair the impact on competition of an adjudged violator's actions, but an insurance provision to be used by competitors like plaintiff to indemnify themselves threefold from the consequences of their own "reprehensible conduct." That ruling should be corrected, and the conflicts in the lower courts resolved.

III

The Fourth Circuit erroneously restricted the judicial power to regulate abuses of joint and several liability.

The third question on which we seek review is whether a court has the power to regulate abuses of joint-and-several liability by reducing an antitrust plaintiff's damages claim to eliminate damages attributable to the plaintiff's dealings with a settled co-conspirator.

As we have seen (p. 14 *supra*), plaintiff enjoyed a secret competitive edge over all other throwsters by virtue of its kickback arrangement with Leeson. After some

throwsters stopped paying royalties to Leeson, however, thereby ending plaintiff's edge, plaintiff joined other throwsters in an antitrust suit against Leeson based, as the trial court here noted, "on the same horizontal conspiracy" plaintiff later asserted against defendants in this case. App. B, JA59. Subsequently, after Leeson had been adjudged an antitrust violator for its kickback scheme but before trial of damages issues, plaintiff and Leeson settled: plaintiff gave up its claim against Leeson (whose share of the false twist machinery market during the pertinent period exceeded two-thirds) and plaintiff received in return only a sum equal to a portion of its attorneys' fees.

The trial court here, noting the "peculiar facts of this case," App. C, JA71, found inequity in allowing a massive shift of trebled damages when "the biggest textile company on earth [plaintiff] goes out and settles with perhaps the biggest textile machinery manufacturer on earth [Leeson]." App. F, JA93. Accordingly, relying on the defense of "claim reduction," the trial court held that it was "eminently fair" to reduce plaintiff's damages by eliminating the \$14 million attributable to plaintiff's royalty payments to Leeson. App. C, JA73.

But the Fourth Circuit reversed, holding that, under this Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the federal courts are totally powerless to consider the fairness of an antitrust plaintiff's effort to shift damages among alleged joint wrongdoers, but must instead rigidly apply the rule of joint and several liability. 690 F.2d at 391-95; App. A, JA22-31.

The Fourth Circuit's ruling extends the effective reach of *Texas Industries* well beyond its grasp. The sole issue

in *Texas Industries* was whether the antitrust laws provide for a separate and independent right of action for contribution among joint tortfeasors. In concluding that such a right could not be implied from the treble-damages remedy, this Court made clear that the judiciary retained the power to "identify the scope of the remedy" embodied in the Clayton Act. 451 U.S. at 646. As *Texas Industries* explained, adoption of the rule of joint and several liability was one exercise of that power; as the trial court here understood, claim reduction to regulate abuses of that rule is but another manifestation of the same authority.*

The Fourth Circuit's reading of *Texas Industries* has direct consequences for every antitrust case alleging a horizontal price agreement. In such cases, each antitrust defendant faces the prospect of trebled damages based not only on his own actions but also on the actions of all others in the industry who are said to have joined in the agreement. This prospect, together with the growth of class and multi-plaintiff consolidated litigations, creates the risk that a single defendant may be exposed to industry-wide and crippling liabilities. Such a risk, unknown in other areas of antitrust law, vests the plaintiff with enormous powers to choose its adversaries, to exert tremendous pressure for settlement, to settle with those against whom plaintiff would prefer not to litigate, and to engage in selective pun-

* Cf. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1949 n.1 (1982) (Powell, J., dissenting) (noting "inequitable result" of multi-million dollar damages judgment after plaintiff had settled with the principle tortfeasors).

In rejecting claim reduction, the Fourth Circuit relied also on the majority opinion in *Hydrolevel*. See 690 F.2d at 392-93; App. A, JA25-26. But *Hydrolevel* held only that a trade association could be liable for the actions of its member-agents, 102 S. Ct. at 1944-46, not that a court was without power to reduce a plaintiff's damages.

ishment. The exercise of those powers to capture trebled damages may achieve social benefits in some cases; in others, however, the result is abuse of joint and several liability and a net social cost. Claim reduction offers a safeguard against the latter situation.

In denying the federal courts the authority to adopt claim reduction, the Fourth Circuit ignored the *judicial* evolution of law that enabled plaintiffs to shift liability in the first place. It was a court, not Congress, that decided to engraft joint-and-several liability on Section 4 of the Clayton Act. It was a court, not Congress, that decided that a release of one jointly-liable conspirator released all such conspirators, and it was a court, not Congress, that later altered that rule to allow a releasor to preserve his claim against nonsettling conspirators. Without these *judicial* decisions, antitrust plaintiffs would have no right to sell one claim cheaply and then seek to recover the very same claim from another. To perceive a reservoir of judicial authority to implement claim reduction is to recognize only a power to regulate the effects of prior judicial determinations.

Claim reduction fully preserves the fundamentals animating the prior judicial determinations. Joint and several liability is designed only to assure that "plaintiffs will be able to recover damages from some, if not all, participants," *Texas Industries, Inc. v. Radcliff Materials, Inc.*, *supra*, 451 U.S. at 646 (emphasis added); the objective is to preserve plaintiff's ability to recover damages in the event some participants are judgment proof or not amenable to process, *see Atlanta v. Chattanooga Foundry &*

Pipeworks, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). That objective is fully satisfied when, as here, plaintiff is in fact able to recover from all participants but decides to release one. The release may entitle plaintiff to proceed against the remaining participants, *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 347 (1971), but the release cannot and does not *bind* a court to impose on the remaining participants the full impact of the damages attributable to the settled tortfeasor. The courts, through interpretation and application of Section 4 of the Clayton Act, are alone empowered to determine plaintiff's entitlement to those damages.

Claim reduction does no violence to the aims of Section 4: defendants here would remain fully liable for treble the overcharge, if any, on plaintiff's payments to defendants. But nothing in the text of Section 4 requires that defendants bear as well the full brunt of industry-wide liability. And when, as here, that burden is sought to be imposed as a result of a settlement between Leeson (plaintiff's supplier and a competitor of defendants) and plaintiff (also a competitor of defendants), the courts are not disarmed to prevent an abuse of judicial processes that produces an unfair and inequitable result. Because the Fourth Circuit's contrary ruling rests on an overly-broad reading of a decision of this Court, certiorari is necessary to make clear that the federal courts retain the power to prevent such abuses through interpretation and application of Section 4.

IV

In allowing a party to recover damages for the claim of a nonparty, the Fourth Circuit denied petitioners due process.

The final question on which we seek this Court's review raises not a need to clarify the scope of a statutory remedy, or to resolve conflicts in its application, but to repair an egregious and unprecedented deprivation of due process.

The facts are these: When this consolidated action began in 1969, the Fedelon Throwing Corporation was a separately-incorporated, wholly-owned subsidiary of plaintiff and a customer of Leesona (but not of defendants). Fedelon had once paid royalties to Leesona, but, when plaintiff and other throwsters sued defendants, Fedelon did not join the suit. In 1970, Fedelon was merged into plaintiff. In the years following the merger, plaintiff gave defendants no notice of any claim relating to Fedelon. During the liability trial in 1976-77, there was no whisper of Fedelon. Only at the damages trial *in 1980* (long after defendants' liability to plaintiff had been adjudged) did plaintiff for the first time mention Fedelon and claim Fedelon's royalty payments to Leesona—of which defendants knew nothing—as damages to be trebled (amounting to almost \$2 million).

The statute of limitations on the Fedelon claim had of course long expired (15 U.S.C. § 15b). The district court, consequently, held that plaintiff could not now claim Fedelon royalties as damages. But the Fourth Circuit reversed, ruling that, since Fedelon had paid royalties to Leesona and thus must have had the “same” claim as plaintiff, no “actual prejudice” resulted from the lack of notice. 690 F.2d at 390; App. A, JA20.

That ruling, we submit, stands the Constitution on its head. Without a summons, without notice, without discovery, without evidence, without a trial, it is factually impossible and constitutionally repugnant to surmise that Fedelon had a valid claim against defendants, or that defendants had no unique defenses to that claim. By virtue of the merger of Fedelon into plaintiff, plaintiff acquired only a *potential* cause of action. That potential claim could not ripen into an *actual* cause of action unless and until plaintiff asserted the claim by notice. Plaintiff did not give such notice; it did not assert the claim. Defendants, in consequence, were never given the opportunity to take discovery of Fedelon, nor to assert defenses against it. The validity of Fedelon's claim and the existence of defenses remain an utter mystery because—and only because—plaintiff gave no notice.

The most fundamental and abiding tenet of our jurisprudence is that a party cannot be deprived of property without notice and an opportunity to be heard. “‘Parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified.’” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. [1 Wall] 223, 233 (1863)). “The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them.” *Morgan v. United States*, 304 U.S. 1, 18 (1938). Actual prejudice inheres in the denial of notice, and no constitutionally proper judgment may be entered against petitioners absent an opportunity to be heard on Fedelon's claim. See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1961) (vacating judg-

ment entered without notice, notwithstanding the merits of the claim); *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928) (same).

The Fourth Circuit's ruling threatens unpalatable consequences that extend far beyond the injustice of this case. Civil defendants—not only antitrust, but any civil defendant—will be at constant risk that a corporate plaintiff has acquired potentially comparable but unasserted claims. And the plaintiff will have every incentive *not* to assert a subsidiary's claim, lest the notice of the claim expose the subsidiary to discovery and defenses.

Most fundamentally, a defendant's right to due process will depend on his ability to show, without opportunity for discovery or trial, that discovery and trial would have made a difference. That unprecedented ruling cannot be condoned.

Conclusion

This case began almost fourteen years ago. The liability trial consumed the better part of eight months (resulting in a liability judgment against defendants which the trial court later called “a very close case” [App. B, JA54]). The damages trial, even as limited, lasted three weeks. There have been no fewer than seven appeals to the Fourth Circuit, and two prior petitions for certiorari.

Unless this Court now intervenes, the parties will return to the district court for still another damages trial under a clearly improper rule of law, with the prospect of further appeals ahead.

We ask this Court to grant certiorari in order to resolve the issues here raised and to prevent further needless waste of judicial resources.

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Respectfully submitted,

SIMON H. RIFKIND
JAY TOPKIS
(Counsel of Record)
STEVEN B. ROSENFELD
GERARD E. HARPER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

Of Counsel:

HOWARD E. MANNING, SR.
MANNING, FULTON & SKINNER
801 Wachovia Bank Building
Raleigh, North Carolina 27602